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700472  
Sup. Ct.

# CLERK'S COPY.

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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No. 163

COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER

VS.

LAIRD WILCOX AND MAUD WILCOX

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT

---

PETITION FOR CERTIORARI FILED JUNE 25, 1945  
CERTIORARI GRANTED OCTOBER 8, 1945

No. 10895

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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LAIRD WILCOX and MAUD WILCOX, husband  
and wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the Tax Court  
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

EDWARD F. LUNSFORD, ESQ.,  
BERTRAM M. GOLDWATER, ESQ.,

For the Taxpayer.

T. M. MATHER, ESQ.,

For Commissioner.

## The Tax Court of the United States

Docket No. 3743

LAIRD WILCOX and MAUD WILCOX,

(husband and wife)

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, San Francisco IRA:90-D RR, dated October 9, 1943, and as a basis of their proceedings allege as follows:

1. Petitioners are husband and wife, residing at 866 Forest Street, Reno, Nevada. The return for the period here involved was filed with the Collector for the District of Nevada.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to petitioners on October 9, 1943.

3. The taxes in controversy are income taxes for the calendar year 1941 and in the amount of \$2,978.09. (In [2\*] that amount there is included the tax on \$4.00 as an error in computation. This tax on the said \$4.00 petitioners herewith waive.)

4. The determination of tax set forth in said notice of deficiency is based upon the following

\*Page numbering appearing at top of page of original certified Transcript of Record.

error: The Commissioner has included as taxable gain or income the sum of \$12,748.60, which said sum is not gain or income within the meaning of Section 22 of the Internal Revenue Code of 1941.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) The said \$12,748.60 upon which the Commissioner bases the deficiency, represents funds which the husband, Laird Wilcox, during the taxable year feloniously and illegally withdrew from his employer, Nevada Transfer and Warehouse Company, a corporation, with its principal place of business at Reno, Nevada:

(b) The said sum was embezzled and taken from said employer and withheld by the said husband without any color of title or claim of right;

(c) That the said sum was taken and retained by said husband without any right or color of right;

(d) The said sum was lost by the petitioner husband in gambling and he realized no gain or profit from its use or conversion. [3]

Wherefore, petitioners pray that this Court may hear the proceeding and determine that petitioners are not liable for a deficiency for the year 1941.

LAIRD WILCOX

MAUD WILCOX

Petitioners.

866 Forest St., Reno, Nevada

4      *Laird Wilcox and Maud Wilcox*

State of Nevada,  
County of Washoe—ss.

Laird Wilcox, being duly sworn, says: That he is one of the petitioners above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the statements contained therein are true.

LAIRD WILCOX

Subscribed and sworn to before me this 29th day of December, 1943.

[Seal]      MARIAN B. NOBLE

Notary Public in and for the County of Washoe,  
State of Nevada. [4]

State of Nevada,  
County of Washoe—ss.

Maud Wilcox, being duly sworn, says: That she is one of the petitioners above named; that she has read the foregoing petition and is familiar with the statements contained therein, and that the same are true except that she has been informed as to the facts set forth in Par. 5 of said petition, and as to those she believes the same to be true.

MAUD WILCOX

Subscribed and sworn to before me this 29th day of December, 1943.

[Seal]      MARIAN B. NOBLE

Notary Public in and for the County of Washoe,  
State of Nevada. [5]

EXHIBIT "A"

Form 1234

SN-IT-5

Treasury Department  
Internal Revenue Service  
74 New Montgomery Street  
San Francisco 5, California

Oct. 9 1943

Office of  
Internal Revenue  
Agent in Charge  
San Francisco Division

IRA 90-D

RR

Mr. Laird Wilcox and  
Mrs. Maud Wilcox,  
Husband and Wife,  
866 Forest Street,  
Reno, Nevada.

Sir and Madam:

You are advised that the determination of your income-tax liability for the taxable year (s) ended December 31, 1941 discloses a deficiency of \$2,978.09 as shown in the statement attached. Said deficiency has been assessed under the provisions of the internal-revenue laws applicable to jeopardy assessments.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal

holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Respectfully,

GUY T. HELVERING,

Commissioner.

By F. M. HARLESS

Internal Revenue Agent in  
Charge.

Enclosure:

Statement [6]

# STATEMENT

San Francisco

IRA 90-D

RR

Mr. Laird Wilcox and  
Mrs. Maud Wilcox  
Husband and Wife,  
866 Forest Street,  
Reno, Nevada

Tax Liability for the Taxable Year Ended December 31, 1941.

Assessed—September 21, 1943 list

	Liability	Assessed	Deficiency
Income Tax .....	\$3,143.08	\$164.99	\$2,978.09

This determination of income tax liability is made on the basis of information on file in this office.

## ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....\$ 3,697.81

Unallowable deductions and additional income:

(a) Error in computation .....	\$ 4.00	
(b) Funds withdrawn .....	12,748.60	12,752.60

Net income adjusted .....\$16,450.41

# EXPLANATION OF ADJUSTMENTS

(a) An understatement of \$4.00 is noted in salaries reported. The correct difference between salary of \$3,800.00 and expenses of \$33.00 is \$3,767.00 instead of \$3,763.00.

(b) During the taxable year you withdrew funds of \$12,748.60 from the Nevada Transfer and Warehouse Company, which amount is included in your taxable income.

(c) Earned income credit of \$376.70 is allowed, representing 10 percent of your net salary of \$3,767.00 as corrected.

## COMPUTATION OF TAX

Net income adjusted .....\$16,450.41

Less:

Personal exemption .....\$1,500.00

Credit for dependents ..... 400.00 1,900.00

Balance (surtax net income) .....\$14,550.41

Less:

(e) Earned income credit

(10 per cent of \$3,767.00) ..... 376.70

Net income subject to normal tax.....\$14,173.71

Normal tax at 4 percent on .....\$14,173.71 \$ 566.95

Surtax on .....\$14,550.41 2,576.13

Correct income tax liability .....\$ 3,143.08

Income tax assessed:

Original, account No. 301109—District of Nevada... 164.99

Deficiency of income tax .....\$ 2,978.09

[Endorsed]: Filed T.C.U.S. Jan. 3, 1944. [8]

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition. [9]

(b), (c), and (d) Denies the allegations contained in subparagraphs (b), (c), and (d) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

(Signed) J. P. WENCHEL TMM  
Chief Counsel,  
Bureau of Internal Revenue.

Of Counsel:

B. H. Neblett,  
Division Counsel.

T. M. Mather,  
Attorney,  
Bureau of Internal Revenue.

TMM/lis 1/25/44

[Endorsed]: Filed T.C.U.S. Jan. 31, 1944. [10]

[Title of Tax Court and Cause.]

### STIPULATION OF FACTS

The undersigned counsel for the above respective parties hereby stipulate as follows:

That the said deficiency in the sum of \$2,978.09 results primarily from the inclusion in income of \$12,748.60 taken by the taxpayer from his employer, Nevada Transfer and Warehouse Company, a Nevada corporation, under the following circumstances:

(a) That the taxpayer, Laird Wilcox, entered the employ of Nevada Transfer and Warehouse Company in December of 1937, in the capacity of bookkeeper and continued in its employment until June of 1942;

(b) That during the last couple of years of his employment, he was receiving a salary of \$200.00 per month, payable semi-monthly; [11]

(c) That it was not the custom of his employer to allow him to draw in advance on his salary;

(d) That he drew and was paid his salary promptly as and when due;

(e) That in June of 1942 at the time his books were audited, his employer for the first time discovered that he had converted to his own use between June of 1941 and up to and including the 20th day of June, 1942, a total sum of \$22,896.01, of which the said sum of \$12,748.60, here in controversy, was taken by the taxpayer between and including June of 1941 and December 31, 1941;

(f) That at no time during said period was the employer indebted to him other than for his salary which was currently paid, as aforesaid;

(g) That the said \$12,748.60 was all composed of miscellaneous sums of money belonging to the employer and received and collected by the taxpayer at different times, in his capacity of bookkeeper; he failed to deposit said moneys to the credit of his employer; that the taxpayer made false and fictitious entries in the books of account of his employer in order to prevent discovery of the fact that moneys received by the taxpayer [12] for his employer were not credited and deposited to his employer's account; that the same were secretly and nefariously withheld by the taxpayer unknown to, and without the consent of, his employer; that the taxpayer in some instances pocketed and withheld

payments in cash made to him by customers of his employer and failed to credit the customers' accounts or his employer's accounts receivable with said sums;

(h) That the discovery of the foregoing acts of the taxpayer was not made until, as aforesaid, in June of 1942;

(i) That the taxpayer gambled and lost practically all of the money withheld by him, as aforesaid, from his employer, in different gambling houses in Reno, Nevada;

(j) That a criminal complaint charging the taxpayer with embezzlement covering the aforementioned acts, was filed in the Justice's Court of Reno Township, Washoe County, Nevada, on July 17, 1942, on which date he was arrested, thereafter arraigned and waived preliminary examination on July 20, 1942. An information was filed against him in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on July 20, 1942, in the following language: [13]

"Douglas A. Busey, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above entitled Court that Laird Wilcox, Sr. the defendant above named, has committed a felony, to-wit: Embezzlement in the manner following:

That the said defendant on the 20th day of June, A. D. 1942, or thereabout, and before the filing of this information, at and within the

County of Washoe, State of Nevada, while an employee and agent of the Nevada Transfer and Warehouse Company, Incorporated, a Nevada corporation, was authorized to and did have possession of and charge of the collection and deposit of all moneys for the said Nevada Transfer & Warehouse Company; that said defendant, unlawfully, wilfully and feloniously, while so entrusted with the moneys so collected for the said Nevada Transfer & Warehouse Company, convert the sum of \$22,896.01, lawful money of the United States, to his own use, with the intent then and there to steal the same from and to defraud the said Nevada Transfer & Warehouse Company, a Nevada corporation, of Reno, Washoe County, Nevada. All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada."

On the same day the information was filed, he was arraigned and entered a plea of guilty as charged. On July 21, 1942, he was sentenced to not less than two nor more than fourteen years imprisonment in the State Penitentiary at Carson City, Nevada. He served time in the Penitentiary on this sentence until paroled about the middle of December of 1943. Attached hereto and made a part hereof is a full, true and correct copy of the information to which he entered his plea of guilty as aforesaid. [14]

(k) That the taking of said sum as aforesaid has never been condoned nor forgiven by the em-

ployer, and it always has and now does hold the taxpayer liable to restore the same.

That in the trial of this case, the above entitled Court may treat and consider the above statement as constituting proven facts in this record.

Dated this 28th day of April, 1944.

E. L. LUNSFORD, and  
BERT GOLDWATER,

Attorneys for Petitioners

J. P. WENCHEL

Chief Counsel

TMM

Of Counsel

Attorneys for Respondent

[15]

In the Second Judicial District Court of the State  
of Nevada, in and for the County of Washoe

No. 71320

Dept. No. 1

THE STATE OF NEVADA, Plaintiff,

against

LAIRD WILCOX, SR.

Defendant.

### INFORMATION

Douglas A. Busey, District Attorney within and for the County of Washoe, State of Nevada, in the name and by the authority of the State of Nevada, informs the above-entitled Court that Laird Wil-

cox, Sr., the defendant above named, has committed a felony, to-wit: Embezzlement in the manner following:

That the said defendant on the 20th day of June A. D., 1942, or thereabout, and before the filing of this information, at and within the County of Washoe, State of Nevada, while an employee and agent of the Nevada Transfer and Warehouse Company, Incorporated, a Nevada corporation, was authorized to and did have possession of and charge of the collection and deposit of all moneys for the said Nevada Transfer & Warehouse Company; that said defendant, unlawfully, wilfully and feloniously, while so entrusted with the moneys so collected for the said Nevada Transfer & Warehouse Company, convert the sum of \$22,896.01, lawful money of the United States, to his own use, with the intent then and there to steal the same from and to defraud the said Nevada Transfer & Warehouse Company, a Nevada corporation, of Reno, Washoe County, Nevada.

All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada.

DOUGLAS A. BUSEY

District Attorney of Washoe  
County, Nevada

By HAROLD O. TABER  
Deputy.

The following are the names of such witnesses as are known to me at the time of filing the within information:

Harry E. Stewart  
Ray Armstrong  
Sam Kafoury  
Mrs. Harry E. Stewart  
Paul Walker

DOUGLAS A. BUSEY

District Attorney of Washoe  
County, Nevada

By HAROLD O. TABER  
Deputy.

State of Nevada,  
County of Washoe—ss.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for Washoe County, said court being a court of record, having a common law jurisdiction, and a clerk and a seal, do hereby certify that the foregoing is a full, true and correct copy of the original, Information, In case No. 71320 Dept. No. 1. The State of Nevada, Plaintiff, against Laird Wilcox, Sr., Defendant, which now remains on file and of record in my office at Reno, in said County.

In Testimony Whereof, I have hereunto set my

hand and affixed the seal of said court, at Reno,  
this 15th day of March, A. D. 1944.

[Seal]              E. H. BEEMER

Clerk.

By M. COOPER

Deputy.

Filed: Jul 20, 10:15 A. M. '42. E. H. Beemer,  
Clerk; By A. G. Caughlin, Deputy.

[Endorsed]: Filed T.C.U.S. May 10, 1944 [16]

[Title of Tax Court and Cause.]

Edward F. Lunsford, Esq., and  
Bertram M. Goldwater, Esq.,

For the Petitioners.

T. M. Mather, Esq.,

For the Respondent.

#### MEMORANDUM OPINION

Opper, Judge: By this proceeding petitioners seek a redetermination of a deficiency in the sum of \$2,978.09 for the year 1941. The sole question for our determination is whether a sum embezzled by Laird Wilcox constitutes taxable income. A small adjustment in income from salary is conceded by petitioners.

All of the facts are stipulated and are hereby found accordingly.

Laird Wilcox, hereinafter referred to as petitioner, entered the employ of Nevada Transfer and

Warehouse Company in December of 1937 in the capacity of bookkeeper and continued in its employment until 1942. [17] During the last few years of his employment he was receiving a salary of \$200 per month, payable semi-monthly. It was not the custom of his employer to allow him to draw his salary in advance.

Petitioner drew and was paid his salary promptly as and when due. In June of 1942, at the time petitioner's books were audited, his employer for the first time discovered that petitioner had converted to his own use between June of 1941, and up to and including June 20, 1942, a total sum of \$22,896.01, of which sum \$12,748.60 was taken by petitioner between and including June of 1941, and December 31, 1941. This is the sum here in controversy.

At no time during this period was petitioner's employer indebted to him for other than salary which was currently paid. The \$12,748.60 was composed of miscellaneous sums of money belonging to petitioner's employer and received and collected by petitioner at different times in his capacity as bookkeeper. Petitioner failed to deposit the moneys to the credit of his employer and made false and fictitious entries in the accounts of his employer in order to prevent discovery. Petitioner, in some circumstances pocketed and withdrew payments in cash made to him by customers and failed to credit the customers' accounts or the employer's accounts receivable with the sums. The moneys were secretly

and nefariously withheld by petitioner without the knowledge or consent of his employer. Petitioner gambled and lost practically all the money withheld by him in various gambling houses in Reno, Nevada. [18]

A criminal complaint charging petitioner with embezzlement on the basis of the foregoing was filed on July 17, 1942, when petitioner was arrested. He was thereafter arraigned and waived preliminary examination on July 20, 1942. An information was filed against him in the Second Judicial District Court of Nevada on July 20, 1942, charging him with embezzlement. On the same day petitioner was arraigned and entered a plea of guilty as charged. He was sentenced to not less than two nor more than fourteen years imprisonment. He served this sentence until paroled about the middle of December of 1943.

The taking of the money as above set out has never been condoned or forgiven by the employer which always has and does now hold petitioner liable to restore it.

The present facts are indistinguishable from Estate of Thomas Spruance, 43 B.T.A. 221, and in our view the result that embezzled moneys constitute income taxable to the embezzler must equally apply here. True, that case was reversed on appeal by the Fifth Circuit, 127 Fed. (2d) 572, sub nom. McKnight, Administrator v. Commissioner. But in the meantime, two similar decisions of the Board of Tax Appeals had been affirmed. In Kurre v. Helvering, 126 Fed. (2d) 723, the Eighth Circuit af-

firmed a memorandum opinion<sup>2</sup> holding the proceeds of embezzlements taxable; and in *Humphreys v. Commissioner*, 125 Fed. (2d) 340, (certiorari denied 317 U. S. 637), the Seventh Circuit affirmed the Board's decision, 42 B.T.A. 857, in which it was held that ransom money obtained by a kidnapper, and to which his title was no better than to embezzled funds, "constitutes income under section 22 (a) of the Revenue Act of 1928." (page 880). [19]

In some respects the present proceeding may be slightly more favorable to respondent's position than *McKnight, Administrator v. Commissioner*, *supra*. There the Court pointed out that "the Board \* \* \* finds that the gain arose on his [the embezzler's] using the funds for his own purposes, whatever they were. The time of using, and not the time of taking, then would determine the incidence of the tax, and about that nothing is known;" [underscoring added] whereas, here it is stipulated that petitioner gambled and lost "practically all" the money withheld by him, and if the losses were not contemporaneous with the takings, petitioner certainly had the burden of proof.

Again, it is granted in the *McKnight* opinion that "It may be true that one who grows rich by systematic pilferings in his business which cannot be traced and recovered may realize taxable gain \* \* \*". Here, the size and circumstances of the thefts made discovery probable, and in fact it eventually occurred. But as of the end of the taxable year before us the embezzlements had not yet been unearthed, so that if the situation as it existed at the

end of the taxpayer's annual accounting period is controlling, the facts would not warrant the conclusion that he would certainly be called upon to make restitution. Cf. *North American Oil Consolidated v. Burnet*, 286 U. S. 417.

The difficulties of employing such a criterion as the test of taxability need not be explored at length, for it is only fair to concede that basically the McKnight case is inconsistent with the present result. Because the weight of authority is the other way, because our own decisions have consistently held such receipts to be taxable income, and because, [20] due to the conflict among the Circuits, and the lack of any controlling word from the Supreme Court, any conclusion we might reach would be irreconcilable with some authority, we feel compelled, with deference, to depart from the doctrine of that case. On the authority of *Estate of Thomas Spruance*, *Kurrie v. Helvering*, and *Humphreys v. Commissioner*, Decision will be entered for the respondent.

Enter:

Entered: Aug. 21, 1944. [21]

*vs. Commissioner of Internal Revenue*

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The Tax Court of the United States  
Washington

Docket No. 3743

LAIRD WILCOX and MAUD WILCOX,  
(husband and wife),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, entered August 21, 1944, it is Ordered and Decided: That there is a deficiency in income tax of \$2,978.09 for the year 1941.

Enter:

Entered Aug 22 1944

[Seal]

(Signed) WILLIAM W. ARNOLD,  
Judge. [22]

In the United States Circuit Court of Appeals  
for the Ninth Circuit

Dkt. No. 3743

LAIRD WILCOX and MAUD WILCOX,  
(husband and wife),

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW OF A DECISION  
OF THE TAX COURT OF THE UNITED  
STATES

To the Honorable Judges of the Circuit Court of  
Appeals for the Ninth Circuit:

Come Now, Laird Wilcox and Maud Wilcox,  
petitioners above named, and hereby petition for a  
review of a decision of the Tax Court of the United  
States, and respectfully show the Court:

(a) The nature of the controversy is that the  
Commissioner of Internal Revenue, respondent  
above named, determined a deficiency of \$2,978.09  
upon the income-tax return of petitioners for the  
calendar year 1941. The Commissioner of Internal  
Revenue determined said deficiency by including the  
sum of \$12,748.60 as taxable gain or income received  
by petitioners during said calendar year of 1941.  
Said sum of \$12,748.60 consists entirely of funds  
which the husband-petitioner, Laird Wilcox, during  
the taxable year 1941 feloniously and illegally em-

bezzled from his employer, Nevada Transfer and Warehouse Company, a corporation. Petitioners contend that said sum of \$12,748.60 does not constitute taxable gain or income and should not have been included in said income-tax return. The Tax Court of the United States [23] has held that said sum is taxable income and that said deficiency was properly determined by the Commissioner of Internal Revenue. A Memorandum Opinion for the respondent was entered August 21, 1944 in the Tax Court of the United States, and a Decision pursuant to said determination was entered by said Court August 22, 1944 that there is a deficiency in petitioners' income tax of \$2,978.09 for the year 1941. That said decision of the Tax Court of the United States is not in accordance with law and that said Court failed and refused to follow the case of *Mc Knight, Administrator vs. The Commissioner of Internal Revenue*, 127 Fed. (2d) 572, which decision by the Circuit Court of Appeals for the Fifth Circuit is the highest authority in point of law and the last case in point of time holding that embezzled monies do not constitute income taxable to the embezzler.

(b) Petitioners seek review in the Circuit Court of Appeals for the Ninth Circuit.

(c) The income-tax return for petitioners for the year 1941 was made and filed with the Collector of Internal Revenue for the District of Nevada, which district is within the Ninth Circuit, and within the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit.

*Laird Wilcox and Maud Wilcox*

Wherefore, petitioners pray that this Honorable Court review the decision of the Tax Court of the United States.

EDWARD F. LUNSFORD  
BERT GOLDWATER

Attorneys for Petitioners, 206  
N. Virginia St., Reno, Nev.

[Endorsed]: T.C.U.S. Filed Sept. 12, 1944. [24]

The Tax Court of the United States

Docket No. 3743

LAIRD WILCOX and MAUD WILCOX (husband  
and wife),

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

NOTICE OF THE FILING OF A PETITION  
FOR REVIEW OF A DECISION OF THE  
TAX COURT OF THE UNITED STATES

To J. P. Wenchel, Chief Counsel of the Bureau of  
Internal Revenue, Washington, D. C.:

Notice is hereby given that Laird Wilcox and Maud Wilcox, husband and wife, petitioners above named, have filed with the Clerk of the Tax Court of the United States, a petition for review of the decision of the Tax Court of the United States in the above entitled action, which decision was en-

tered August 22, 1944, pursuant to a memorandum opinion in said Court entered August 21, 1944. Said petition seeks a review of said decision by the Circuit Court of Appeals for the Ninth Circuit.

Dated this 7th day of ~~8~~September, 1944.

Service of a copy of the foregoing, together with a copy of the petition for review, is hereby acknowledged this 13th day of September, 1944.

(s) J. P. WENCHEL,

Chief Counsel, Bureau of  
Internal Revenue.

EDWARD F. LUNSFORD  
BERTRAM M. GOLDWATER  
Attorneys for Petitioners  
206 N. Virginia Street  
Reno, Nevada

[Endorsed]: T.C.U.S. Filed Sept. 12, 1944. [25]

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[Title of Tax Court and Cause.]

### CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 27, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States,

at Washington, in the District of Columbia, this  
26th day of Sept. 1944.

[Seal]

B. D. GAMBLE

Clerk, The Tax Court of the  
United States.

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[Endorsed]: No. 10895. United States Circuit  
Court of Appeals for the Ninth Circuit. Laird Wil-  
cox and Maud Wilcox, husband and wife, Petition-  
ers, vs. Commissioner of Internal Revenue. Re-  
spondent. Transcript of the Record. Upon Peti-  
tion to Review a Decision of The Tax Court of the  
United States.

Filed October 13, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

*vs. Commissioner of Internal Revenue.*

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10895

LAIRD WILCOX and MAUD WILCOX, (hus-  
band and wife)

Petitioners.

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### SPECIFICATION OF ERROR

Come Now Laird Wilcox and Maud Wilcox, pe-  
titioners above named, and hereby specify the fol-  
lowing error and assign said error as the point upon  
which petitioners will rely in presenting this appeal,  
to-wit:

The holding of The Tax Court of the United  
States that embezzled funds are taxable as gross  
income was error.

Dated this 20th day of October, 1944.

EDWARD F. LUNSFORD  
BERT GOLDWATER

Attorneys for Petitioners  
206 North Virginia Street  
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[Endorsed]: Filed Oct. 23, 1944. Paul P.  
O'Brien, Clerk.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10895

**LAIRD WILCOX and MAUD WILCOX**, (hus-  
band and wife)

Petitioners,

v.

**COMMISSIONER OF INTERNAL REVENUE**,  
Respondent.

**DESIGNATION OF CONTENTS OF RECORD  
ON REVIEW**

To Paul P. O'Brien, Clerk of the United States  
Circuit Court of Appeals for the Ninth Circuit,  
J. P. Wenchel, Chief Counsel of the Bureau of  
Internal Revenue, Washington, D. C., and  
Samuel O. Clark, Jr., Assistant Attorney Gen-  
eral of the United States, Washington, D. C.:

Please Take Notice that as required by Subdivi-  
sion 6 of Rule 19 of the Rules of the United States  
Circuit Court of Appeals for the Ninth Circuit,  
petitioners in the above entitled cause do hereby  
designate the following portions of the records and  
proceedings to be contained in the transcript on  
review in the above entitled cause, to-wit:

1. The Petition in said action
2. The Answer in said action
3. The Stipulation of Facts in said action
4. The Memorandum Opinion in said action
5. The Decision in said action
6. The Petition for Review

7. The Notice of Filing Petition for Review
8. Specification of Error
9. This Designation of Contents of Transcript  
on Review.

Dated this 20th day of October, 1944.

**EDWARD F. LUNSFORD**  
**BERT GOLDWATER**

Attorneys for Petitioners  
206 North Virginia Street  
Reno, Nevada.

[Endorsed]: Filed Oct. 23, 1944. Paul P.  
O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, March 8, 1945

Before DENMAN, HEALY, and BONE, Circuit Judges

*Order of submission*

Ordered petition to review argued by Mr. Bert Goldwater, counsel for petitioners, and by Mrs. Muriel S. Paul, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

Excerpt from Proceedings of Friday, March 30, 1945

Before DENMAN, HEALY, and BONE, Circuit Judges

*Order directing filing of opinion and filing and recording of judgment*

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10,895—Mar. 30, 1945

LAIRD WILCOX AND MAUD WILCOX, HUSBAND AND WIFE,  
PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Upon Petition to Review a Decision of the Tax Court of the United States

Before DENMAN, HEALY, and BONE, Circuit Judges.

DENMAN, Circuit Judge:

This is a review of decision of the Tax Court holding that an embezzler of moneys derives income from such moneys under Section 22 of the Internal Revenue Code, providing

"SEC. 22. GROSS INCOME.

"(a) General Definition—"Gross Income" includes gains, profits; and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever . . . ."

and that such embezzled funds constitute a part of embezzler's taxable gross income.

Laird Wilcox, one of the petitioners, hereafter called Wilcox, entered the employ of the Nevada Transfer & Warehouse Co., a Nevada corporation, in December 1937, in the capacity of bookkeeper and continued in its employ until 1942. During his employment, Wilcox received a regular salary, payable semi-monthly, and was not allowed to draw his salary in advance and was paid his salary promptly as and when due. It is stipulated that at no time during that period of employment was the employer indebted to Wilcox other than for his salary which was currently paid.

In June 1942, when the books of the Nevada Transfer & Warehouse Co. were audited, it was discovered for the first time that Wilcox had converted to his own use between June 1941 and up to and including June 20, 1942, a total sum of \$22,896.01, of which sum \$12,748.60, now in controversy, was taken by him between and including June 1941 and December 31, 1941. The \$12,748.60 was composed entirely of miscellaneous sums of money belonging to the Nevada Transfer & Warehouse Co. and received and collected by Wilcox in his capacity of bookkeeper. He withheld the money which he had so embezzled from his employer and then used the money for gambling, losing practically all of it in different gambling houses in Reno, Nevada.

And information was filed against Wilcox for the crime of such embezzlement in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on July 20, 1942. On the same day the information was filed he was arraigned and entered a plea of guilty as charged. On July 21, 1942, he was sentenced to not less than two nor more than fourteen years imprisonment in the State Penitentiary at Carson City, Nevada. He served time in the penitentiary on this sentence until paroled in December 1943.

The taking of the moneys by Wilcox from the Nevada Transfer & Warehouse Co. has never been condoned or forgiven by the employer and it always has and now does hold him liable to restore the same. Wilcox at no time claimed, nor could have claimed, that he took or held the moneys under any claim of right.

It is agreed that after the appropriation of the moneys there were no "dealings in the property" embezzled by which there were "gains" or "profits" within section 22, *supra*. The sole question is whether the embezzled moneys *per se* are to Wilcox "gains or profits" and income derived from any source whatever under that section.

The crime of embezzlement in Nevada is complete when the embezzler "use[s] or appropriate[s] such money \* \* \* in any manner or for any other purpose than that for which the same was \* \* \* entrusted." *State v. Trolson*, 21 Nev. 419, 425, 427. Here the record shows that the appropriation for gambling purposes occurred at the taking of the moneys.

Under the law of Nevada the employer here could have replevined the embezzled moneys in the possession of the embezzler as soon as he appropriated them. *Sec. 8681 Nevada Compiled Laws, 1929; Perkins v. Barnes*, 3 Nev. 510, 511; *Studebaker Co. v. Witcher*, 44 Nev. 468, 471. Also under the Nevada law an embezzler is liable to the party from whom the property is appropriated for an amount equal to its value. This is so whether after appropriation the moneys are hid in a basement or used in gambling. The use in no way transfers the property right of the owner in the moneys.

We agree with the Fifth Circuit decision in *McKnight v. Commissioner*, 127 F. 2d 572, that since the embezzler took the moneys with no conceivable claim or colorable claim of right, and held them not as his but as his employer's, it at no time became a taxable gain or profit or income to Wilcox, and adopt the reasoning of that opinion, based upon the statement in *North American Oil Consolidated Co. v. Burnet*, 286 U. S. 417, 424: "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."

Respondent claims that the decision in the Eighth Circuit in *Kurrie v. Helvering*, 126 F. 2d 723, is *contra*. That decision, however, relies upon the statement of law in the *North American*

<sup>1</sup> Cf. *Boston Consolidated Gas Co. v. Commissioner*, 128 F. 473, 477, opinion *Magruder, C. J.*; *Caldwell v. Commissioner*, 135 F. 2d 488, 491.

Consolidated Oil case, *supra*, concerning a taxpayer who "receives earnings under a claim of right" and appears to hold that, though received without claim of right, they are taxable if the embezzler subsequently "treated said funds as if his own" in a profitable enterprise. If this be not a ground of distinguishing the Kurre case from the instant review, we are not in accord with that opinion.

The Commissioner relies upon *Helvering v. Clifford*, 309 U. S. 331. That case construed a complicated trust instrument to determine to whom the income of the trust is taxable. In the present case there was no income to the embezzler from the embezzled funds and no analogous trust relationship. What was said in the Clifford case at page 334 concerning "Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue. That issue is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus," has no application to the title to embezzled moneys which the owner could replevin as soon as appropriated by the embezzler.

In all of the other cases cited by the Commissioner<sup>2</sup> the moneys, though fraudulently or illegally acquired, came to the taxed party from their owner by the latter's conscious act, in response to a claim for an agreed service by the party to whom they were paid. All are cases where the recipients are taxable within the rule in the North American Consolidated Oil case, *supra*. They have no bearing on the taxability of an embezzler in whose hands the embezzled money always belonged to the wronged owner.

The order of the Tax Court is

**Reversed.**

(Endorsed:) Opinion. Filed March 30, 1945. Paul P. O'Brien, Clerk.

(T. C. Memo. Opinion 8-21-44)

### *Judgment*

Upon Petition to Review a Decision of the Tax Court of the United States.

This Cause came on to be heard on the Transcript of the Record from the Tax Court of the United States, and was duly submitted.

<sup>2</sup> Such as *Caldwell v. Commissioner*, 125 F. 2d 488, (C. C. A. 5); *Chadick v. United States*, 77 F. 2d 961 (C. C. A. 5); *Humphrey v. Commissioner*, 125 F. 2d 340 (C. C. A. 7).

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the said Tax Court of the United States in this Cause be, and hereby is, reversed.

(Endorsed:) Judgment. Filed and entered March 30, 1945.  
Paul P. O'Brien, Clerk.

*Certificate of clerk U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the revised rules of the Supreme Court of the United States*

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-six (36) pages, numbered from and including 1 to and including 36, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the respondent, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 31st day of May 1945.

[SEAL]

PAUL P. O'BRIEN, Clerk.

## Supreme Court of the United States

*Order allowing certiorari*

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.